IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ANTHONY and CATALINA ASUNCION, husband and wife, and DA PAN,	)	No. 62509-8-I
Appellants,	)	DIVISION ONE
v.	)	UNPUBLISHED OPINION
CITY OF SEATTLE,	)	
Respondent.	)	FILED: July 20, 2009

Appelwick, J. — Plaintiffs sued the City for trespass, negligence, breach of contract, and nuisance after flooding of the combined sewer and storm water mainline during two significant summer storms caused damage to their basements. Plaintiffs appeal the trial court grant of summary judgment in favor of the City, the basis of which was expiration of the statute of limitations, failure to state a claim, and failure to comply with the claim-filing statutes. We affirm the trial court's grant of summary judgment as to the negligence, breach of contract, and nuisance claims. We reverse as to the trespass claim.

FACTS

During severe rain storms on August 24, 2004, and September 12, 2004, the city of Seattle's (City) combined sewer and storm water mainline in the area of 15th Avenue Southwest, Seattle, Washington was unable to accommodate

the increased flow. Plaintiffs Anthony and Catalina Asuncion (hereinafter Asuncion) live at 7715 15th Avenue Southwest, Seattle, Washington. Plaintiff Da Nous Pan (Pan) lives at 7719 15th Avenue Southwest, Seattle, Washington. As a result of the storms, plaintiffs' homes flooded with water and sewage.

Asuncion filed a claim for damages against the City for damages on September 23, 2004, alleging that heavy rain caused flooding at his home.[1] The claim stated that on August 24, he received a call from his son, notifying him that the basement had flooded. Asuncion arrived home, finding his basement full of mud and leaves, and his carpet soaked with water. He believed that the water came from the street. Pan filed a claim for damages against the City for damages on September 27, 2004, alleging that heavy rain caused flooding at his home.[2] On September 12, Pan heard water running inside his house. He discovered a sudden flood in the basement, where high pressure water was coming out of his toilet and bathtub. The water contained dirt and leaves, and covered the whole basement floor in about four inches of standing water.

In a letter dated November 5, 2004, the City's adjuster notified Asuncion that the City had completed its investigation of the claim for damages. Because the mainline was free of defects and blockages, and because the maintenance cycles had been met, the City could not be responsible for the damage that

[1] Flooding also occurred on May 31, 2005, after the filing of the claim for damages.
[2] These dates are the dates on which the City noted, in a box titled "City Use Only," that Asuncion and Pan had filed the claims. (Capitalization omitted). These dates are different than the dates on which Asuncion and Pan signed the claim for damages, which are September 21, 2004 and September 22, 2004, respectively.

occurred during the significant storm events earlier that year.

In June 2005, Neil Thibert, acting director of engineering support at Seattle Public Utilities (SPU), performed an inspection and evaluation of the combined sewer and storm water mainline on 15th Avenue Southwest. Thibert concluded that the flooding was not caused by any blockage or other problem with the eight inch mainline. Rather, Thibert concluded that the line was simply overburdened by the level of water from the rainstorms.

In October 2005, Steve Merrill, an engineer from a private firm hired by the city, conducted a review of the flooding problems near 15th Avenue Southwest and Southwest Holden Street and reported to Thibert that the current system resulted in water surface elevations near the ground surface in major storm events. He also proposed a number of ways to remedy the problem, including expansion of the line's diameter.

SPU then sought approval from the Department of Executive Administration to waive the competitive bidding requirements for the repair at 15th Avenue Southwest and Southwest Holden Street, so the City could prevent further incidents of sewage flooding private homes and avoid lawsuits. Since the repair, the homes have not flooded.

Asuncion and Pan filed their complaint in King County Superior Court on June 22, 2007, alleging that the City was responsible for damages caused to their property under theories of negligence, strict liability,[3] nuisance, breach of

[3] Asuncion and Pan have not provided argument or legal or factual authority for the strict liability

contract, and any other legal theory recognized under Washington law.

The City moved for summary judgment, arguing three different theories for dismissal: that plaintiffs had failed to state a claim for which relief could be granted, that plaintiffs' claims were barred by the statute of limitations as prescribed by RCW 4.16.130, and that plaintiffs had failed to comply with claims filing requirements of RCW 4.96.020 and Seattle Municipal Code (SMC) 5.24.005. In response to the plaintiffs' opposition to summary judgment, the City moved the court to strike much of the material included in the opposition. The court did not explicitly rule on the motion to strike.

The trial court granted the City's motion for summary judgment. Included on the list of records and files the court considered in granting the City's motion for summary judgment was the plaintiffs' opposition to summary judgment, suggesting that the court considered the materials the City sought to strike. The City now asks this court to rule on the motion to strike.

Plaintiffs timely appeal the court's order granting defendant's motion for summary judgment, granted on September 17, 2008.

DISCUSSION

Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). A material fact is one upon which the outcome of the litigation

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claim articulated in the complaint. Therefore, we do not address it. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

depends. Greater Harbor 2000 v. City of Seattle, 132 Wn.2d 267, 279, 937 P.2d 1082 (1997).

We review a grant of summary judgment de novo, engaging in the same inquiry as the trial court and viewing the facts and the reasonable inferences from those facts in the light most favorable to the nonmoving party. Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). This court may affirm summary judgment on any theory supported by the record. LaMon v. Butler, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989).

I. Statute of Limitations

The parties do not dispute that Asuncion's and Pan's negligence and nuisance claims are subject to the two year statute of limitations in RCW 4.16.130. Rather, they dispute whether the discovery rule should apply, and if so, when Asuncion and Pan discovered the basis for the cause of action.

The discovery rule may apply where the plaintiff does not immediately discover the injury. Wallace v. Lewis County, 134 Wn. App. 1, 13, 137 P.3d 101 (2006). The discovery rule postpones the running of the statute of limitations until the time when the plaintiff, through exercising due diligence, should have discovered the basis for the cause of action and the plaintiff knows or should know that the defendant is responsible. Id.; Orear v. Int'l Paint Co., 59 Wn. App. 249, 257, 796 P.2d 759 (1990). Whether the plaintiff has exercised due diligence is a question of fact, which is the defendant's burden to prove.

Wallace, 134 Wn. App. at 13.

However, the discovery rule does not apply if the defendant can present uncontroverted facts showing that the plaintiff immediately knew of the damage, as the cause of action accrues when the plaintiff knows the factual, but not necessarily legal, basis for the cause of action. 1000 Virginia Ltd. P'ship v. Vertecs Corp., 158 Wn.2d 566, 576, 146 P.3d 423 (2006); see also Allen v. State, 118 Wn.2d 753, 760, 826 P.2d 200 (1992) (explaining that on summary judgment, where there are no genuine issues of material fact, the court may decide that the discovery rule does not apply).

Asuncion and Pan argue that there is an issue of fact as to when they knew about the defect in the City's sewer and storm water system. Although they filed claims for damages with the City in late September 2004, they claim they did not know of the capacity problem until October 2005, when Merrill gave his engineering report to the City, which described the lack of capacity due to the eight inch main.[4]

The fact of the flooding, combined with both plaintiffs' immediate response in filing the claims for damages with the City, demonstrates that the plaintiffs had knowledge both of the facts underlying their causes of action and that the City was the responsible party. Accord Fradkin v. Northshore Util. Dist.,

[4] Plaintiffs' reliance on Vertecs Corp. for the proposition that the discovery rule applies when there is a delay in discovering the basis for a cause of action is misplaced. The specific holding of Vertecs Corp. was that the discovery rule applies in actions for breach of construction contracts where the plaintiff alleges latent defects. Vertecs Corp., 158 Wn.2d at 582.

96 Wn. App. 118, 122, 977 P.2d 1265 (1999) (holding that, in an action for permissive waste, the plaintiff's awareness of drainage problems occurring in 1992, as well as his knowledge of the cause, constituted the critical event for accrual purposes, even though a 1995 report supplied him with useful evidence to prove the extent of his damages).

The contention of Asuncion and Pan that they were not able to discover the basis for the cause of action until October 2005 is without merit. The only new information they obtained from the 2005 engineering report was the specific nature of the sewer and storm water mainline's inadequate capacity for high inflow, a reality already experienced by Asuncion and Pan during the two floods in 2004. Further, they could have obtained the same information in the 2005 report through discovery, had they timely filed their suit after the City denied payment of their damage claims.

Asuncion and Pan cannot use the discovery rule to toll the two year statute of limitations for their negligence and nuisance claims, as they had immediate notice of both the fact of injury to their property, and knew that the City was the responsible party.

However, the two year statute of limitations was tolled by operation of RCW 4.96.020(4), which provides a sixty-day waiting period when a citizen files suit against the city for tortious conduct:

> No action shall be commenced against any local governmental entity . . . for damages arising out of tortious conduct until sixty days have elapsed after the claim has first been

> presented to and filed with the governing body thereof. The applicable period of limitations within which an action must be commenced shall be tolled during the sixty-day period.

Even using the most recent, and therefore most generous, date of injury (the flood on September 12, 2004), and tolling the two year statute of limitations for sixty days, the filing of the complaint on June 22, 2007, exceeds the two year statute. The negligence and nuisance claims are untimely.

The remaining causes of action are breach of contract and trespass.[5] Asuncion and Pan contend that their trespass and breach of contract claims are subject to a three year statute of limitations, as mandated by RCW 4.16.080(1),(3). The City argues that the trespass claim is not distinct from the negligence claim, and should be subject to the two year statute of limitations for injury to property, not the three year statute of limitations for trespass under RCW 4.16.080(1).

Where a plaintiff includes multiple causes of action in a complaint, each cause of action must be evaluated under its own statute of limitations. Wallace,

[5] The complaint itself did not specifically allege trespass. Rather, the complaint included a catch all for any other legal theory recognized under Washington law. However, the City did not argue—either at trial or on appeal—that the trespass claim was insufficient for notice pleading. When issues that are not raised by the pleadings are tried by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the pleadings. Dewey v. Tacoma Sch. Dist. No. 10, 95 Wn. App. 18, 26, 974 P.2d 847 (1999). In determining whether the parties impliedly tried an issue, an appellate court will consider the record as a whole. Id.

Asuncion and Pan specifically mentioned the trespass claim in their memorandum in opposition of summary judgment. In its reply to the plaintiffs' discussion of the trespass claim in the opposition to summary judgment, the City responded that plaintiffs were attempting to avoid the two year statute of limitations by characterizing their claims for damages as well as the allegations in their complaint as trespass. On appeal, the City argues that the complaint fails "to allege any disruption of Appellants' exclusive possession or intentional act that would foreseeably have disturbed Appellants' possession." The trespass claim, although not pleaded with specificity, has been tried by implied consent.

134 Wn. App. at 13 n.8 (applying different statute of limitations for the plaintiff's claims of injury to property, nuisance, and trespass). A claim for breach of contract, express or implied, which is not in writing, and does not arise out of any written instrument, is subject to a three year statute of limitations. RCW 4.16.080(3). A claim for trespass upon real property is subject to a three year statute of limitations. RCW 4.16.080(1); Bradley v. Am. Smelting & Ref. Co., 104 Wn.2d 677, 692–93, 709 P.2d 782 (1985).

The City's reliance on Pepper v. J.J. Welcome Constr. Co., for the proposition that the trespass claim must be combined with the negligence claim is misguided. 73 Wn. App. 523, 871 P.2d 601 (1994), abrogated on other grounds by Phillips v. King County, 87 Wn. App. 468, 943 P.2d 306 (1997). In Pepper, the court explained that three separate legal theories based upon one set of facts constitute one claim for relief for purposes of judgment upon multiple claims under CR 54(b). Id. at 546. Further, the court explained that a party's characterization of a claim is not binding upon a court in analyzing a motion to dismiss. Id. at 546–47 (explaining that a negligence claim presented in the garb of nuisance need not be considered apart from the negligence claim). These rules from Pepper cannot be construed to mean that all claims arising from the same set of facts must then share the same statute of limitations, because each cause of action in a complaint is evaluated under its own statute of limitations. Wallace, 134 Wn. App. at 13 n.8. The trespass claim is distinct from the

negligence claim.

Using the date of the first flood on August 24, 2004, as date of injury (the earliest, and therefore least generous), the trespass and breach of contract claims are timely, as Asuncion and Pan filed their complaint on June 22, 2007, within three years of the date of injury. Further, the three year statute of limitations for both claims was tolled by the sixty day provision of RCW 4.96.020(4), so they would have had until October 2007 to file these claims. The trespass and breach of contract claims were timely brought.

II. Failure to State a Claim

Dismissal for failure to state a claim is appropriate only when it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint that would entitle the plaintiff to relief. Orwick v. City of Seattle, 103 Wn.2d 249, 254, 692 P.2d 793 (1984). We presume the plaintiffs' factual allegations to be true for the purpose of this motion. Id.

A. Breach of Contract Claim

In both their complaint and memorandum in opposition to summary judgment, Asuncion and Pan alleged a breach of contract claim. The City asserts that the Asuncion and Pan have not provided any legal or factual authority for the contract claim. Indeed, they have not provided any legal authority or factual basis for a breach of contract claim, either in their trial or appellate materials. There is no relief to be granted on the contract claim.

B. Trespass Claim

An action for trespass, which includes trespass by water, Hedlund v. White, 67 Wn. App. 409, 418 n. 12, 836 P.2d 250 (1992) (citing Buxel v. King County, 60 Wn.2d 404, 409, 374 P.2d 250 (1962)), is the intentional or negligent intrusion onto or into the property of another by the defendant. Mielke v. Yellowstone Pipeline Co., 73 Wn. App. 621, 624, 870 P.2d 1005 (1994) (citing the Restatement (Second) of Torts §§ 158, 165, 166 (1965)). A claim of trespass does not require a permanent or recurring invasion.[6] Hoover v. Pierce County, 79 Wn. App. 427, 431-32, 903 P.2d 464 (1995).

While Asuncion and Pan do not provide argument on their trespass claim other than the statute of limitations argument, the record contains sufficient facts to entitle them to continue litigating their claim.[7] They provided their claim for damages filed with the City in September 2004. Their claims for damages, signed under penalty of perjury, state that the City's water and sewer system failed, flooding their basements and causing damages. The claims for damages also specify the amount of damages.[8] The declarations[9] of both Catalina

[6] This rule renders ineffectual the City's argument that Asuncion and Pan have failed to allege a continuing trespass.

[7] The City moved to strike plaintiff's opposition to summary judgment and some of its attached exhibits. A party may object to a trial court decision relating to the record by motion in the appellate court. RAP 9.13. The trial court did not specifically rule on the motion to strike. However, the order granting the City's motion for summary judgment suggests that the trial court considered the materials that the City now moves this court to strike, as the order granting summary judgment states that the trial court read and considered the opposition to defendant's motion for summary judgment. We decline to rule on the motion to strike, as we have not considered or relied on any of the disputed materials in reaching our decision.

[8] Asuncion claimed $19,000 in damages (this number does not appear in the "amount claimed" box; rather, Asuncion specified the damages in the section where the form asked whether the property was damaged). Pan claimed $9,784 in damages.

Asuncion and Pan state: "[i]n September 2004 my house sustained flooding damage when during a heavy rain water backed up through the toilets and drains of my basement." Considered together, this is prima facie evidence of a trespass claim for purposes of summary judgment analysis, where the facts and reasonable inferences are viewed in the light most favorable to the nonmoving party. There is a set of facts, consistent with the complaint, that might entitle the plaintiff to relief. Orwick, 103 Wn.2d at 254. Asuncion and Pan stated a trespass claim for which relief could be granted.[10]

III. Claim-Filing Statute

The only remaining alternative ground on which the trespass claim could have been dismissed was failure to comply with the claim-filing statutes. Asuncion and Pan contend that they met all requirements of the claim-filing statutes, SMC 5.24.005(A) and RCW 4.96.020. The City responds that the claims for damages omitted information concerning the witnesses, acts or omissions by the City, or the basis for the City's responsibility.[11]

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[9] The City moved to strike the unexecuted declarations of Pan and Asuncion, but the record contains executed declarations, which the City does not move to strike.

[10] Further, the public duty doctrine the City discusses in its briefing does not apply to trespass claims. Rather, the public duty doctrine precludes negligence claims, providing that if the duty breached by the governmental entity was merely the breach of an obligation owed to the public in general, then a cause of action does not lie for any individual injured through the breach of that duty. Taylor v. Stevens County, 111 Wn.2d 159, 163, 759 P.2d 447 (1988).

Even if the public duty doctrine were construed to apply to all tort claims, it would not apply here. The doctrine applies to governmental functions but not to proprietary functions. Borden v. City of Olympia, 113 Wn. App. 359, 371 53 P.3d 1020 (2002). Washington has long recognized that operation of a sewage system is a proprietary function. Hayes v. City of Vancouver, 61 Wash. 536, 112 P. 498 (1911).

[11] The parties do not dispute that Asuncion and Pan waited the 60 days before filing their suit in superior court. (They filed their claim for damages on September 23 and 27, 2004, respectively; they filed their complaint in King County Superior Court on June 22, 2007).

The general purpose of the claim-filing statute is "to allow government entities time to investigate, evaluate, and settle claims" before they are sued. Medina v. Pub. Util. Dist. No. 1, 147 Wn.2d 303, 310, 53 P.3d 993 (2002). RCW 4.96.020 provides the filing requirements for persons claiming damages from tortious conduct by local government entities:

> (3) All claims for damages arising out of tortious conduct must locate and describe the conduct and circumstances which brought about the injury or damage, describe the injury or damage, state the time and place the injury or damage occurred, state the names of all persons involved, if known, and shall contain the amount of damages claimed, together with a statement of the actual residence of the claimant at the time of presenting and filing the claim and for a period of six months immediately prior to the time the claim arose. . . .
>
> (4) No action shall be commenced against any local governmental entity . . . for damages arising out of tortious conduct until sixty days have elapsed after the claim has first been presented to and filed with the governing body thereof. The applicable period of limitations within which an action must be commenced shall be tolled during the sixty-day period.

The SMC 5.24.005 provision requires a substantially similar process:

> A. No action shall be commenced against the City in which monetary damages are being claimed until a written Claim for Damages has been presented to and filed with the City Clerk. Such a claim must name the claimant, include the claimant's address, specify the date and location of the claimed loss, describe any alleged act or omission on the part of the City and the basis upon which liability is being asserted against the City, identify any known witnesses, detail the nature and extent of the injury or damage sustained and state the amount being claimed. The claim form must be signed by the claimant or an authorized representative prior to its filing.
> . . .

> C. A lawsuit based upon the allegations of a Claim for Damages may not be instituted against the City within sixty (60) days of the filing of such claim.

Interpreting RCW 4.96.010(1) and RCW 4.96.020, we stated in Renner v. City of Marysville, that while courts require strict compliance with the filing deadlines provided by RCW 4.96.020, the content of the claim for damages need only substantially comply. 145 Wn. App. 443, 451, 187 P.3d 283 (2008), review granted, 165 Wn.2d 1027, 203 P.3d 382 (2009). Substantial compliance requires: (1) a sufficient bona fide attempt to comply with the law, notwithstanding that the attempt is defective in some particular; and (2) the attempt at compliance must actually accomplish the statutory purpose, which is to give the governmental entity such notice as will enable it to investigate the cause and character of the injury. Brigham v. City of Seattle, 34 Wn.2d 786, 789, 210 P.2d 144 (1949). Required information that is totally absent from the claim "cannot be supplied by any method of construction, however liberal." Id.

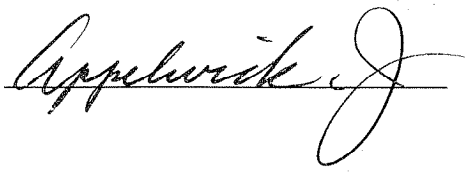
Using a form provided by the City of Seattle, both Asuncion and Pan described the floods in their basements, clearly stating that they had witnessed the flooding themselves. Pan specified that the flooding was happening from the toilet and bathtub. Further, while neither claim for damages specifically alleged that the City was responsible for maintenance of the sewer and storm water mainlines, the complaints gave sufficient notice to the City to allow investigation of the cause and character of the injury by virtue of the description of the

flooding and the dates on which it occurred (the dates of the significant storm events).

The City also contends that the suit filed in superior court was not a suit brought on the same basis as the allegations made in the claim for damages, required by SMC 5.24.005C. The complaint filed in King County Superior Court alleged that the City was responsible for damages caused to the plaintiffs' property under theories of negligence, nuisance, breach of contract, and any other legal theory recognized under Washington law. This was a suit based on allegations of flooding and water damage, arising from the same set of facts described in the claims for damages. Nowhere in either claim-filing statute does it require the claimant to specify the legal causes of action in the claim for damages.

Asuncion and Pan substantially complied with both RCW 4.96.020 and SMC 5.24.005.

We affirm the trial court's entry of summary judgment in favor of the City as to the breach of contract, nuisance, and negligence claims. We reverse the trial court's entry of summary judgment in favor of the City as to the trespass claim.



WE CONCUR: